

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Appellant,

v.

M. K. WALL,

Appellee.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

Upon appeal from the United States District Court
for the District of Idaho, Northern Division.

BRIEF OF APPELLEE, M. K. WALL.

FRANK LANGLEY,
Attorney for Appellee.
Coeur d'Alene, Idaho,

Filed this.....day of February, 1914.

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STATEMENT OF THE CASE.

The Record herein shows the following facts:

That on March 6, 1911, the appellee, M. K. Wall,
sold and conveyed to the Lane Lumber Company,
bankrupt, the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ of section 35, and
the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 26, Twp. 49 North,
Range 2, W. B. M., Kootenai County, Idaho, for the
agreed purchase price of \$5000.00, no part of which
has ever been paid, and the payment of which is un-
secured otherwise than by the personal obligation of
the buyer (Record pp. 32 and 33); on June 20, 1911, a
petition was filed by various creditors to have the

said Lane Lumber Company adjudged a bankrupt (Record p. 34); on July 29, 1911, said Lane Lumber Company was adjudged a bankrupt (Record p. 33); on September 22, 1911, Samuel L. Boyd qualified as trustee of the bankrupt, and has continued to act, and is now acting, as such trustee (Record p. 33), and, as such trustee, he had no notice of said vendor's lien until the same was filed with the referee, Lawrence L. Lewis (Record p. 34); that M. K. Wall was Secretary of the bankrupt, with full knowledge of its embarrassed financial condition at the time of said transfer, which said purchase and transfer was not authorized or ratified by the Board of directors of said Lane Lumber Company (Record p. 35); that M. K. Wall, as an officer of the bankrupt, permitted said lands to remain on the records unincumbered (Record p. 35); on June 19, 1912, M. K. Wall filed his proof of secured debt claiming \$5000.00 as a vendor's lien against the above described property of the bankrupt (Record p. 33); the appraised value of the land on which the vendor's lien is claimed, placed thereon by the appraisers, is \$919.00 (Record p. 34); on August 10, 1912, the trustee filed his objections to said proof of secured debt (Record p. 33); on July 31, 1913, the referee overruled said objections and allowed the proof of secured debt as a vendor's lien in the sum of \$5000.00 (Record p. 19); on September 3, 1913, the

trustee filed his petition for review (Record p. 15); on November 19, 1913, the referee filed his report thereon with the Clerk of the U. S. District Court (Record p. 22); on December 2, 1913, the Hon. Frank S. Dietrich, U. S. District Judge, rendered his Memorandum Decision affirming the referee in establishing said vendor's lien (Record p. 25); on December 13, 1913, said District Judge caused his Findings of Fact and Conclusions of Law to be filed (Record p. 32); and, on December 23, 1913, said District Judge caused his Judgment thereon to be filed (Record p. 36).

The foregoing Statement of the Case is based upon the Findings of Fact herein (Record pp. 32 to 36).

From said Memorandum Decision, and said Judgment, the trustee has appealed to this Honorable Court.

ARGUMENT.

The facts in this case are not in dispute, for they are contained in the Findings of Fact of the District Judge (Record pp. 32 to 36), and the only questions involved are questions of law.

The Appellee takes exception to the statement, found on page 6 of Appellant's Brief, to the effect that the trustee paid taxes on the lands involved, for the reason that the same is not included in the assignments of error (Record pp. 39 and 40), and is not shown

by said Findings of Fact (Record p. 32), nor by any other part of the Record.

The Appellee deems it advisable to explain to the Court the grounds upon which the vendor's lien claim is based, and to then discuss the effects of the bankruptcy proceedings, particularly the effects of the trustee's rights and powers under Section 47a of the Bankruptcy Act of 1898, as amended in 1910, upon the lien claim.

It must be held that, under the facts as found and conceded in this case, the right to a lien for the unpaid purchase price existed at the time of the commencement of the proceedings in bankruptcy. Indeed, the trustee has conceded such to be the fact and the law: See Memorandum Decision of Judge Dietrich (Record p. 26). Such a lien is established by Section 3441, Idaho Revised Codes, reading:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

The case of Bayley vs. Greenleaf, 7 Wheat. 46; 5 L. Ed. 393, cited in Appellant's Brief at page 11 in support of the statement that vendor's liens are looked upon with disfavor in the United States, is not applicable to the case at bar, because Section 3441,

Idaho Revised Codes, *supra*, settles the question in Idaho. The *Bayley vs. Greenleaf* decision is based upon the theory that both parties to the litigation possess equal equities and that neither has a legal advantage; while in the case at bar, the vendor's lien claimant has a greater equity as well as a legal advantage under said section 3441 of the State Statutes. Neither does the decision in that case correctly state the law as to vendor's liens as later established by the Courts of the United States. Courts of Equity look upon vendor's liens as creatures of the highest equity.

Baum. v. Grigsby, 21 Calif. 172, 176.

Redfield v. Woodfolk, 63 U. S. 22 How. 318; 16 L. Ed. 370.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509; 38 L. Ed. 802.

That portion of the trustee's Brief dealing with the question of the merits of vendor's liens in general is neither material to nor pertinent to the issues involved in this controversy, for the reason that the Legislature of the State of Idaho, in its wisdom, has seen fit to establish the right to a vendor's lien under the facts existing in this case as shown by the above quoted section of the State Statutes; and the question of whether such a law is good or wise is imma-

terial to this controversy. If there is merit in such an argument, by counsel for the trustee, it should be addressed to the State Legislature, or to Congress, not to the courts whose province it is to enforce the law as it is written.

In passing upon lien claim based upon State laws, bankruptcy courts follow the law of the State where the land in controversy is situated. Counsel for the trustee has not cited, and can not cite, a case where a Federal Bankruptcy Court has refused to recognize and uphold a State law affecting title to real property in a controversy involving a lien or mortgage claim against such property.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304, *supra*.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509; 38 L. Ed. 802, *supra*.

Sturdevant Bank v. Schade, 195 Fed. 183.

Bankruptcy Act of 1898, as amended, Sec. 67 (d).
Section 67 (d) of the Bankruptcy Act reads:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

It is not contended by the trustee that this lien was not given and accepted for a present, valuable consideration; for the claimant has parted with the ownership of the lands involved and has never been paid one cent on the purchase price, though the same is long past due. Neither is it contended by the trustee that the laws of Idaho require vendor's liens to be recorded; and it is neither so required nor provided for. Nor is there anything in the Record nor in the Findings of Fact of the District Judge (Record pp. 32 to 36), nor in the trustee's assignments of error (Record pp. 39 & 40), that raises the question of bad faith or fraud on the part of anyone; unless, the trustee is acting in bad faith in attempting to defeat the lien claim upon the ground that the purchase of the lands involved was not authorized by the Board of Directors of the bankrupt company. But such a contention can not be sustained. The Lane Lumber Company obtained title, and possession of the lands, and still holds the same, upon its promise to pay the price; and it can not now be heard to say that it will receive and hold the benefits of its possibly unauthorized contracts, and refuse to pay the consideration agreed upon therefor. M. K. Wall has the same right to his vendor's lien that he has to the allowance of his claim as an unsecured debt.

Idaho 361; 78 Pac. 1080.

Chilton v. Lyons, 67 U. S. 458; 17 L. Ed. 304,
supra.

Slide etc. Gold Mines v. Seymour, 153 U. S. 509;
38 L. Ed. 802, 806, supra.

Prior to the amendment to the Bankruptcy Act in 1910, the trustee had not authority to attack claims based upon unrecorded liens and mortgages even where the State law required such to be recorded; nor did he then possess certain other powers now his under the Act, as amended.

Remington on Bankruptcy, Secs. 1207½ to 1210.

In re Economical Printing Co., 110 Fed. 514.

York Mfg. Co. v. Cassell, 201 U. S. 344; 50 L.
Ed. 782.

But, Section 47a of the Act, as amended in 1910, confers upon trustees, "*as to all property in the custody or coming into the custody of the bankruptcy court, all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.*" The purpose of such amendment relates not to the validity of liens established and recognized under State laws; but only to the trustee's right to question claims that are defective or invalid under such laws. Section 70 of the Act fixes the trustee's title.

Loveland on Bankruptcy (4th Ed.), section 372.

In re Morris 204 Fed. 770.

In re Raymond Box Company, 205 Fed. 618.

Big Four Implement Co. v. Wright, 207 Fed. 535.

In re Stern, 208 Fed. 488.

Corey v. Blackwell Lbr. Co (Idaho), 135 Pac. 742.

Memorandum Decision of Judge Dietrich (Record pp. 26 to 32).

The Committee Report of the House of Representatives, bearing upon the object of the amendment of the above Section 47, and quoted in Appellant's Brief at pages 18 and 19, shows the purpose of Congress to have been to give to the trustee the right and power to attack lien claims because of some inherent defect therein, or because of failure to place the same of record where the State law required such to be done; and, further, shows that the intention of Congress was to recognize the laws of the State where the property involved is situated.

The cases of *In re Morris*, 204 Fed. 770; *In re Raymond Box Co.*, 205 Fed. 618; and *Corey v. Blackwell Lumber Co. (Idaho)*, 135 Pac. 742, *supra*, cited in appellant's Brief at pages 14 and 15, exactly sustain our view of the purpose of Congress in amending Section 47 of the Bankruptcy Act in 1910. In the case of *In re Morris*, 204 Fed. 770, cited in Appellant's Brief at page 11, where creditors objected to the discharge of the trustee for the reason that, un-

der the decision in *Butler v. Badouine*, 82 N. Y. Supp. 773; 69 N. E. 1121, the trustee after the bankrupt's discharge would not have the right or power to reach the income from a certain trust fund belonging to the bankrupt, the Court remarked that such an objection would have been good prior to the amendment of 1910; but that such objection is no longer good, the Court saying:

"It is not surprising, therefore, to find that subsequent to the *Badouine* decision Congress in 1910 amended the Bankruptcy Act, Section 47 (a) 2 * * * *. Since the right to take proceedings to recover surplus income such as there is alleged to be here, in the interests of all creditors, is now vested in the trustee, and that right will be unaffected by a discharge, there is no longer any reason for postponing an application for discharge."

In the case of *In re Raymond Box Company*, 205 Fed. 618, (C. C. A. 9th Cir.), cited in Appellant's Brief at page 15, where a Chattel Mortgage, not recorded as required by the State laws of Washington, was filed with the trustee as a secured claim, the Court held that under the amendment of 1910 the trustee might attack the mortgage claim, because of the failure to record the same as required by the recording act of the State. From the decision in said case it will be observed that the laws of Washington provide:

"A mortgage of personal property is void as

against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless ***** it is recorded in the same manner as is required by law in conveyance of real property."

The Chattel Mortgage Lien was, therefore, denied, because the State law, quoted supra, made the mortgage lien void as against creditors of the bankrupt; and, because Section 47a of the Bankruptcy Act, as amended in 1910, gives the trustee the rights, remedies and powers of a judgment creditor. In Idaho, there is no law providing that a vendor's lien is void as against creditors of the purchaser; neither is there any law providing for or making it possible to record such a lien. On the contrary, it is expressly provided that the vendor's lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.

Section 3443, Idaho Revised Codes, reads:

"The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

The foregoing section of the Idaho Codes establishes, conclusively, the sole manner by which the vendor's lien is lost in Idaho. At most, the trustee has no greater rights than has a judgment creditor.

But, such a creditor is not "a purchaser or incumbrancer and for value."

Dawson v. McCarty, 57 Pac. 816.

Heister's Lessee (Pa.) 4 Am. Dec. 417, at page 422.)

Pacific State Bank v. Coats, 205 Fed. 618, 625 (C. C. A., 9th Circuit).

Pomeroy's Equity Jurisdiction, section 721.

In the case of *Corey v. Blackwell Lumber Co.* (Idaho), 135 Pac. 742, cited in Appellant's Brief at page 15, the supreme court of Idaho, construing the amendment of 1910 to section 47a of the Bankruptcy Act, cited *Loveland on Bankruptcy* (4th Ed.), section 372, and quoted with approval as follows:

"The effect of said amendment is that the trustee may now challenge any security or conveyance that a lien or judgment creditor might have challenged had the bankruptcy not intervened."

The cases of *Kerr v. Finch*, 135 Pac. 1165, cited in Appellant's Brief at page 16, and *Blake v. Pine Mountain Iron & Coal Co.*, 76 Fed. 624, cited in Appellant's Brief at page 17, do not involve facts or issues even remotely related to those found in the case now under consideration; and, consequently, they have no bearing upon the controversy now before the court.

On the question of laches, raised by the trustee's

first assignment of error (Record pp. 39 and 40), I will call attention to the fact that the land in controversy was sold to the Lane Lumber Company on March 6, 1911 (Record p. 32); that the petition in bankruptcy was filed against said company on June 20, 1911 (Record p. 34); that the company was adjudged a bankrupt on July 29, 1911 (Record p. 33); and that the vendor's lien claim of M. K. Wall was filed on June 19, 1912 (Record p. 33). There was no occasion calling for the filing of the lien claim until the company was adjudged a bankrupt and the trustee qualified. Indeed it is not likely that the claimant ever supposed that he would encounter difficulty in collecting the debt. Nor is it likely that he knew of his right to a vendor's lien for the unpaid purchase price of the lands sold. The State Legislature undoubtedly enacted the vendor's lien Statutes, quoted above, for the very purpose of protecting just such creditor's as the claimant here. Even though it be conceded, for the sake of argument, that section 3443, Idaho Revised Codes, *supra*, did not establish and limit exclusively, the sole manner in which the vendor's lien can be lost, the defense of laches could not be maintained in this case, because no delay in asserting the lien occurred; and, because, as said by this Court in the case of *London & San Francisco Bank v. Dexter Horton & Company*, 126 Fed. 593 (C. C. A., 9th Circuit),

supported by authorities therein cited at page 601:

“One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced.”

Felix v. Patrick, 145 U. S. 317; 36 L. Ed. 719.

Bartlett v. Ambrose, 78 Fed, 839.

Selna v. Selna (Calif.), 58 Pac. 16.

Obert v. Obert, 12 N. J. Eq. 423.

And, wherein has any delay in asserting the vendor's lien caused prejudice to the trustee or to the bankrupt estate? Or, what change in the condition or relations of the property or parties has occurred which would not make it inequitable to permit the lien to be enforced?

In view of the vendor's lien Statutes of Idaho, supra, and of Section 67 (d) of the Bankruptcy Act, and of the equitable nature of proceedings in bankruptcy and of the relief asked, I respectfully submit that the Memorandum Decision and the Judgment of the Honorable District Judge, and each of them, should be sustained and affirmed.

Respectfully Submitted,
FRANK LANGLEY,
Attorney for Appellee,
Address: Coeur d'Alene Idaho.

Service of the foregoing Brief of M. K. Wall, Appellee, is hereby accepted, by the receipt of a copy thereof, this third day of February, A. D., 1914.

E. N. La Veigne.

Attorney for Trustee.

copy.

